

Direct Appeals 28 U.S.C. § 158

Section 158 of the Judiciary Code (Title 28, U.S.C.) was amended to provide the circuit courts of appeal with discretion to accept bankruptcy appeals without an intermediate appellate decision. The circuit court may accept a direct appeal if the appropriate court or party(ies) certifies that direct appeal is necessary to resolve a matter of first impression, conflicting decisions, or public importance, or is a matter that would materially advance the progress of the case. This latter provision is broadly drafted and has the potential to significantly increase the number of requests for direct appeals.¹

The court of appeals has jurisdiction to authorize a direct bankruptcy appeal if either the parties acting unanimously or the court before which the matter is pending, whether bankruptcy court, district court, or bankruptcy appellate panel, certify that:

- (1) the bankruptcy court's decision involves a matter of public importance or a question of law to which there is no controlling decision; **OR**
- (2) the decision involves a question of law requiring resolution of conflicting decisions; **OR**
- (3) an immediate appeal of the decision **may** materially advance the progress of the case or proceeding.

On the request of a party or *sua sponte*, the bankruptcy court, district court, or bankruptcy appellate panel before which the matter is pending can certify the need for direct appeal. If the appropriate court determines that the circumstances in a, b, or c above exist, OR receives a request from a majority of appellants and a majority of appellees for a certification, the court **shall** make the requested certification (i.e., the specified courts have no discretion in these situations).

A direct bankruptcy appeal is permissive. The party or parties to the appeal must file a petition for review with the circuit court of appeals, which has complete discretion as to whether or not it will authorize the appeal.

Interim Rule 8001 addresses several outstanding issues with regard to direct appeals, including:

- Under the Interim Rule, no certification shall be deemed entered on the docket until a timely appeal has been taken in accordance with Interim Rule 8001(a) or

¹ To date, however, this has not been the case. The Administrative Office is aware of two direct appeals having been authorized by a court of appeals (3rd Circuit - Perlin, No. 06-8030, and 9th Circuit - Kagenveama, No. 06-80118).

(b) and a notice of appeal has become effective under Rule 8002.

- This provision was added in order to accommodate the short timeframe included in an uncodified provision of Pub. L. 109-8 § 1233(b)(4), which mandates that a party must file a petition requesting permission to appeal with the circuit clerk no later than 10 days after certification is entered on the docket. There may be instances where the certification is filed before the notice of appeal, thereby creating timing problems. This allows the time for filing the petition with the court of appeals to run from the time an effective notice of appeal is filed.
- Interim Rule 8001 also provides that a matter is pending in the court from which the appeal is being taken until the docketing of the appeal in the District Court or the BAP or grant of leave to appeal. This rule was adopted to clarify the issue of which court has jurisdiction over a matter which is the subject of a direct appeal, i.e., the rule authorizes the bankruptcy court to retain jurisdiction over the direct appeal until the appeal has been perfected. Thus, only the bankruptcy court may make a certification (on request or on its own initiative) before an appeal is docketed or leave to appeal has been granted, and only the district court or bankruptcy appellate panel may certify after docketing in the District Court or the BAP or after leave to appeal has been granted.

Certification Under Rule 8001

- A certification by all appellants and appellees acting jointly may be made by filing the newly created Form 24 (Certification to Court of Appeals By All Parties) with the clerk of the court in which the matter is pending.
- Pursuant to Interim Rule 8001(f)(3)(C), the request for certification shall include the following:
 - the necessary facts to understand the question presented;
 - the question;
 - the relief sought;
 - the reasons why the appeal should be allowed and is authorized by statute or rule, and
 - a copy of the judgment, order, or decree complained of and any related opinion or memorandum.
- In order to stay further proceedings, the appropriate court may issue a stay pending appeal.
- A request for certification of a direct appeal by a party or by a majority of appellants and a majority of appellees (i.e., not a joint certification by all appellants and appellees nor a sua sponte certification) must be made within 60 days after the entry of the judgment, order, or decree.

- When a party files a notice of appeal subject to certification for direct appeal, the fee for filing an appeal (currently \$250, plus the \$5 fee for filing a notice of appeal under 28 U.S.C. § 1930(c)) should be collected by the bankruptcy court. In the event the Court of Appeals authorizes the direct appeal, the appellant must pay an additional \$200 pursuant to Item 15 of the Bankruptcy Court Miscellaneous Fee Schedule. The additional \$200 the fee is to be charged only when the direct appeal has been certified by the district court.